

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE,
LODGE No. 5**

-AND-

**AWARD
AND OPINION**

CITY OF PHILADELPHIA, PA

Docket No. 14 390 00847 12

(Det. Deborah Gore [REDACTED] PR [REDACTED] Discharge)
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BEFORE: ERNEST WEISS, ARBITRATOR

APPEARANCES: For the Union: MARK L. GELMAN, Esq.
 JENNINGS SIGMOND, P. C.

For the City: JAMES KELLETT, INTERN.
 TOI SHIELDS, SENIOR ATTORNEY
 CITY OF PHILADELPHIA, LAW DEPT.

ISSUE: Was the disciplinary discharge of Detective Deborah Gore, [REDACTED]
 PR [REDACTED] for just cause and if not, what shall be the remedy?

PRELIMINARY STATEMENT

Having been selected in accordance with the provisions of the Collective Bargaining Agreement between the above parties, I conducted an arbitration hearing on February 12, 2013 at the offices of the American Arbitration Association in Philadelphia, PA, at which time the parties were afforded an opportunity to present evidence and argument in support of their respective positions.

BACKGROUND

Detective Deborah Gore, the grievant herein, was appointed by the Philadelphia Police Department on January 2, 1995. She was dismissed from her position of Detective assigned to the Criminal Intelligence Unit effective June 21, 2012. Her dismissal, was by a Direct Action of the Police Commissioner, for Conduct Unbecoming, Section 1-026-10.

Specifically, the discharge was initiated by the Commissioners' Direct Action as a result of an incident on Tuesday May 1, 2012 when Detective Gore was arrested by the Bensalem Township police for retail theft, at Kohl's Department Store. She was observed via store cameras by P [REDACTED] I [REDACTED], Loss Prevention Officer at Kohl's.

She was initially observed by I [REDACTED], arriving with her young daughter sitting in the child seat in the front of the shopping cart and two Kohl's bags with returns also in the cart. Ms. I [REDACTED] indicated that she put Detective Gore under camera surveillance when she noticed her arrival with the Kohl's bags in her cart.

In her testimony she narrated the contents of the digital recording made by her with remotely controlled cameras in the camera room of the store, digitally capturing on disc and observing Detective Gore shopping in the various isles of the

store as she was placing merchandise on and in her shopping cart. The recorded disc was submitted C2 in evidence by the City. When she concluded her shopping, she was apprehended upon leaving through the west exit and escorted to the back to the loss prevention office and confronted with five items in her cart for which she failed to pay. Upon arrival of the Bensalem Police, she was arrested.

CONTENTIONS OF THE CITY

The City argued in relevant part, that on May 1, 2012, Detective Gore committed retail theft, when she failed to pay for a number of items that she placed in her shopping cart at Kohl's department store.

She was confronted by loss prevention personnel after leaving the store and was returned to Kohl's loss prevention office, where she was confronted with the five items in her shopping cart for which she failed to pay prior to departing the store. The unpaid items were found in her cart in a Kohl's bag and also at the bottom of the cart under the Kohl's bags containing the various paid-for items.

A Bensalem Township police officer arrived at the store and arrested Detective Gore after hearing from the loss prevention officer what she observed from the camera room. Thereafter, Detective Gore was transported to Bensalem police headquarters where she was charged with retail theft amounting to \$149.99.

In her 75-18 Specifications the City pointed out in relevant part that she was observed initially "...in the make-up section placing eye shadow in your bag. You then proceeded to the lingerie department and selected several bras, also placing them in your bag. You then passed all points of sale without attempting to pay..."(J2)

The City insisted that the penalty for retail theft even on the first offence is just cause for the most severe penalty of discharge. On 5/24/12 Detective Gore was given her Gniotek Warning and an opportunity to respond to the above

allegations but she elected not to respond. As a result she was placed on an immediate 30 day suspension, with the intent to dismiss and was discharged effective June 21, 2012, at the discretion of the Commissioner, resulting in the instant grievance.

CONTENTIONS OF THE FOP

The FOP insisted that the City failed to meet its burden of proving that Detective Gore committed retail theft representing a conduct unbecoming as charged.

It argued in relevant part that Detective Gore made a simple mistake in unintentionally neglecting to pay some items that were under her return items in her cart, not visible to her when she was hurriedly paying for ten other items from her cart.

The FOP stressed that she has had an essentially unblemished 17- year career with the Philadelphia Police Department and rose to the rank of Detective in the Criminal Intelligence Unit.

The FOP stressed that the grievant's court case was dismissed since there was insufficient evidence that she was involved in intentional retail theft. The Commissioner was initially informed that she committed the theft, and he was under the impression that her case was sustained, so he exercised his direct discretion to discharge her without hearing her version of the events on the afternoon of May1, 2012 at Kohl's.

At the instant arbitration hearing Detective Gore testified in relevant part that she has been a detective for some 15 years and has handled a number of retail theft cases.

She also pointed out that she had been a regular shopper at Kohl's and had been given valued customer status and a Kohl's credit card with special discounts and coupons once a month. On the day before this incident,

4/29/12, she purchased 49 items at a cost of \$201.88 and had a total savings of \$342.07. On the day in question herein the sale was still going on and she spent \$39.94 and saved \$80.06 according to her receipts in evidence for the two days.(U1) She saved twice as much as she spent. However, the five items which she inadvertently failed to pay are priced without a saving. Had the same percentage of savings been considered the amount of potential loss to the store would have been significantly less in value.

When she was confronted of being in possession of the five unpaid items she allegedly stated "oh my gosh I decided that I did not want them but I forgot to return them and they were under my returns. I offered to pay but they would not let me."

Finally the FOP argued that given her skills and knowledge as a criminal detective, having just paid for her items at a register close to the exit doors she would not likely have returned to stand in line at the customer service counter with the knowledge that her unpaid items are in the cart. She simply forgot that she had items under the bags of her returns.

Finally the FOP argued that the discharge of Detective Deborah Gore was not for just cause and asks that she be reinstated to her former position and made whole with the Arbitrator retaining jurisdiction with respect to the remedy.

DISCUSSION AND OPINION.

A replay of the video does not reveal that Detective Gore had arrived in the store with the express intention to commit some retail theft. As an experienced professional detective of some 15 years she was certainly aware that cameras exist throughout the entire store. She testified without contradiction that in her capacity as Detective with the Philadelphia Police

Department she made a number of retail theft arrests and was obviously aware that a store as large as Kohl's would have loss prevention security staff.

A grievance was submitted by the FOP on behalf of Detective Gore claiming in part that there was no just cause for the "capital punishment" of discharge. Since the parties were unable to reach a settlement of the grievance, the issue came before me for final and binding resolution in accordance with the Collective Bargaining Agreement between the parties and under the rules of the American Arbitration Association.

In viewing the video, it appears to be obvious that, if her mission was to do some shoplifting, she would not likely have elected to be in the store in late afternoon when the store is relatively empty and she would be clearly exposed to the cameras without the cover of other shoppers. The video, C2 in evidence, revealed that the isles where she was making her selections were in fact empty and most of her selections were draped visibly on the sides or the handles of her cart. The video also reveals that her three year old child was holding a teddy bear picked up near the entrance and appeared to be somewhat fidgety in the front seat of the cart probably causing Detective Gore to hurry her shopping.

Additionally, the video also reveals that at the register, where she was paying for her items and placing them on the cashiers counter her cart was visibly in front of the cashier. She is shown to have a conversation with the cashier about being entitled to some Kohl's cash but was informed that she would need to talk to customer service with her receipt. The video also reveals that the cashier section was only a few feet from the west exit doors, but Ms. Gore elected to return to the Customer Courtesy counter located deep in the store.

As a Detective herself, having just finished paying for her merchandise so close to the exit door, it is unlikely that she would have returned to the customer

service counter, located substantially inside the store, if she knowingly had unpaid merchandise in her shopping cart which did not appear on her receipt, which she needed to present at the customer service desk to receive her bonus coupons. This would not likely be a logical conscious behavior of a shoplifter who just paid the cashier located near the exit doors. It is more likely a behavior of a preferred frequent customer who apparently forgot to empty all her items from the bottom of the shopping cart which also contained her returns that she exchanged earlier at the customer service counter.

The burden of proof that she was involved in an act of unbecoming behavior was not met by the City. Considering of course that a case of this nature is not easy to prove, since it involves an intention and a state of mind. However, judging by her demeanor as depicted by the video, it is more likely that, in her haste and with the presence of her exchanged items in the cart covering the items in question she may have reasonably forgotten that she selected the items in question. Had she reached her car and unpacked all the items from her cart, she probably would have discovered the five small items in and returned to pay for them. This we will never know since she was apprehended with her full cart immediately after leaving the west exit doors and was escorted to the loss prevention office, where she was eventually arrested upon the arrival of the Bensalem Township police following a statement of loss prevention employee, Ms. [REDACTED]

Having learned of the arrest, Police Commissioner Ramsey reacted with the "industrial capital punishment" since one of his detectives was in fact arrested for what appeared to be conduct unbecoming during an off-duty activity. Such behavior, if intentional and deliberate, would certainly call for the most severe punishment. However, her behavior was adjudicated in a court of law and was dismissed for insufficient evidence.

Consequently, I considered her essentially unblemished 17 years of service with the Philadelphia Police Department and some 15 years as Detective with the Criminal Intelligence Unit, I concluded that there was no convincing evidence depicted on the video of the incident. There was nothing to indicate that any of the items in question were concealed in her personal handbag or pockets of her clothing. All five items in question were placed in her shopping cart visibly to the camera and, given the unusual configuration of the deep cart cavity as shown on the video, it was easy for the items to have been inadvertently left on the bottom of the cart and forgotten.

For the above stated reasons I was not convinced that Detective Gore was shown to have been guilty of retail theft. Yes she was arrested but she was not convicted. Her case was dismissed. Her behavior in the store as depicted in the video C2, merely reveals that she was leaving the store with most of her items paid, but merely neglected to check thoroughly the bottom of her cart and inadvertently failed to pay for the five items.

There was no indication that the Bensalem arresting officer saw the video prior to making the arrest. A review of the video which begins with her arrival until her departure from the store does not reveal merchandise being hidden in a private handbag or some other private hidden place. The five items which she failed to pay were placed in the Kohl's shopping cart and wound up underneath the items for which she paid. However, the video reveals that those items were selected first when she arrived and naturally would be on the bottom of the unusual looking cart with what appears to be one deep cloth cavity suspended from the handles and a child seat in the front. It is unlike a metal grocery cart where everything is visible.

Significantly, on June 12, 2012, at the court trial in Bucks County, the case against Detective Gore was dismissed. The following day FOP Vice President John R. McGrody requested her reinstatement in writing but he was not successful and the instant arbitration resulted.(U2)

I also considered the convincing sworn testimony of Commissioner Charles H. Ramsey, who stated in relevant part that, after a review of the available documents in this case, he was compelled to exercise his discretion to issue the most severe penalty of discharge.

However, in this case there was no showing that Detective Gore was involved in deliberate dishonesty, by committing retail theft. Such an of-duty dishonest behavior would be properly regarded a very serious and an intolerable infraction, constituting conduct unbecoming of an officer of the law and just cause for discharge. However, although difficult to prove, the record before me does not show that Detective Gore was guilty of deliberate retail theft.

Therefore, having thoroughly considered all the evidence including the arguments and allegations of both parties I have determined, for the above stated reasons, that grievant Detective Deborah Gore [REDACTED] was discharged not for just cause.

Her grievance is therefore sustained and I make the following Award:

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The undersigned arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above parties, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Her grievance is sustained.

For the above stated reasons, the disciplinary discharge of Detective Deborah Gore [REDACTED] PR [REDACTED] was not for just cause.

The City is hereby directed to reinstate Detective Deborah Gore to her former position and make her whole.

Should the parties fail to agree on the extent of the make whole remedy than, for that sole purpose, I hereby retain jurisdiction.



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ERNEST WEISS, ARBITRATOR

STATE OF: NEW JERSEY
COUNTY OF: SOMERSET

On this 1st day of March 2013, before me personally came and appeared Ernest Weiss, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed same.

My Commission Expires May 3, 2008